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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re:  
THE IT GROUP, INC., *et al.*  
Debtors.

Chapter 11  
Case No: 02-10118 (MFW)  
Jointly Administered  
Relates to Motion at Docket #86

Date: April 19, 2002  
Time: 11:30 a.m.  
Place: United States Bankruptcy Court  
824 Market Street  
6th Floor  
Courtroom 1  
Wilmington, Delaware 19801

**LIMITED/CONDITIONAL OBJECTION OF SHELLEY BOOKSPAN TO MOTION FOR  
ORDER (I) APPROVING (A) ASSET PURCHASE AGREEMENT FOR SALE OF  
SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTORS' BUSINESS, (B) BIDDING  
PROCEDURES IN CONNECTION WITH THE SALE AND (C) BREAK-UP FEE AND  
EXPENSE REIMBURSEMENT IN CONNECTION THEREWITH, (II) AUTHORIZING  
SALE OF ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND  
INTERESTS, (III) DETERMINING THAT SUCH SALE IS EXEMPT FROM ANY STAMP,  
TRANSFER, RECORDING, OR SIMILAR TAX, (IV) AUTHORIZING THE  
ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND  
UNEXPIRED LEASES, AND (V) GRANTING RELATED RELIEF—DOCKET # 86**

Shelley Bookspan (“Ms. Bookspan”), a creditor, party-in-interest, and former officer of PHR Environmental Consultants, Inc., an affiliate of the above-Debtors (Case No. 02-10150), hereby objects (the “Objection”) on a limited basis to the motion filed by the above-debtors captioned: “Motion For Order (I) Approving (A) Asset Purchase Agreement For Sale Of Substantially All Of The Assets Of The Debtors’ Business, (B) Bidding Procedures In Connection With The Sale And (C) Break-Up Fee And Expense Reimbursement In Connection Therewith, (Ii) Authorizing Sale Of Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests, (Iii) Determining That Such Sale Is Exempt From Any Stamp, Transfer, Recording, Or Similar Tax, (Iv) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired

1 Leases, And (V) Granting Related Relief" (the "Sale Motion"). In support of this Objection, Ms.  
2 Bookspan states as follows:

3

4 **SUMMARY**

5 Shelley Bookspan is a former employee of an affiliate of the Debtors, PHR Environmental  
6 Consultants, Inc ("PHR"). While providing services solely to PHR from mid-1997 through 1999,  
7 Ms. Bookspan participated in the IT Group's "unfunded" deferred-compensation plan (the "Plan").  
8 Pursuant to the Plan, Ms. Bookspan deferred approximately 90% of her gross salary/bonuses from  
9 the IT Group for the two year period. She is owed \$429,108.68 in back wages/bonuses. The  
10 Debtors counsel asserts that the Debtors' bankruptcy cases may be "administratively insolvent,"  
11 meaning that if Ms. Bookspan simply filed a proof of claim, she may receive zero (-0-) distribution  
12 from the bankruptcy estate on account of her \$429,108.68 in back wages/bonuses. Ms. Bookspan  
13 believes such an outcome would be an outrage, tantamount to an involuntary servitude for the two-  
14 year period.

15 The Debtors alleged generally that the Plan was never funded. Ms. Bookspan requested  
16 confirmation of this claim through discovery, which was agreed to by the Debtors. Ms. Bookspan  
17 wanted to find out whether there is a trust "*res*" which arguably is not part of the bankruptcy estate  
18 under 11 U.S.C. § 541(d) and not subject to the pending sale; and whether the deferred-  
19 compensation obligations arising to her, or to similarly situated claimants, had possibly been funded  
20 through an escrow account, bank account, payroll account, or functionally equivalent account; or  
21 whether the Debtors made accounting entries restricting assets; or whether fund assets have been  
22 transferred to DIP operating accounts.

23 There are several problems with the Debtors' discovery responses. The Debtors delayed  
24 providing verified responses for about two weeks—which were only received three days ago, on  
25

1 Monday, April 8, 2002. Their interrogatory responses that the “Trust and/or the Plan” were not  
2 funded do not address certain narrow issues regarding financial activity that may have occurred  
3 between November 1, 2001 and the Petition Date: whether funds-transfers were made to bank  
4 accounts or escrow accounts; whether assets have been restricted or unrestricted or otherwise  
5 designated/set aside on the accounting records of the Trustee, Union Bank or the administrator  
6 (CRG), regardless of whether assets were physically transferred; or the balances, if any, of a  
7 particular account at Union Bank relating to the Plan (only a 1997 statement was provided);  
8 whether there are any accounts with the administrator (CRG) and, if so, whether they were funded.  
9 Ms. Bookspan will seek supplemental information/documents regarding the above-issues before the  
10 Sale Hearing pursuant to the usual meet-and-confer procedures for discovery.

12       Further, the Debtors have not yet provided requested written assurances that plan assets  
13 have not been commingled in DIP operating accounts.

15       Some of the discovery that was provided suggests there may be assets in a Trust *res*, which  
16 would have to be used for the exclusive benefit of beneficiaries pursuant to 29 U.S.C. § 1103(c).  
17 For example, a document from 1995 suggests that the Debtors “fund account through a book  
18 reserve.” However, it is without dispute that the Debtors have always intended to “take back” any  
19 undistributed trust *res* that did exist in the event of the Debtors filing bankruptcy: paragraphs 1.3  
20 and 3.7(b) of the Master Trust Agreement explicitly purport to make the assets of the Trust subject  
21 to the claims of Debtors’ creditors in violation of ERISA, 29 U.S.C. § 1103(c). The Debtors’  
22 counsel has also said if the assets did exist, they would be subject to creditors’ claims.

24       As noted, Ms. Bookspan will ask the Debtors to provide supplemental information/  
25 discovery that, hopefully, will be provided before the sale hearing to the Shaw Group. Because of  
26 their delays, however, the supplemental requests could not be submitted to the Debtor’s counsel  
27 before the deadline for preparing/filing this limited opposition.

Ms. Bookspan does not oppose, overall, the sale to the Shaw Group or to a successful overbidder. However, the Shaw Group is proposing to “buy” all of the Debtors’ cash, wherever located. To protect Ms. Bookspan and other beneficiaries, Ms. Bookspan respectfully requests that language be inserted in any sale order which would prohibit the transfer of any cash accounts potentially related to deferred-compensation obligations, or related to accounts with respect to which restrictive accounting entries have been made, absent further order of the Bankruptcy Court.

If the Debtor is correct that no such accounts exist or that no restrictive accounting entries regarding a cash account were made, then such a provision in the order approving the sale will have no impact on the closing of the Debtors' sale to the Shaw Group or a successful overbidder.

## FACTS

1. Ms. Bookspan is a former majority stockholder of PHR. Ms. Bookspan sold PHR to the Debtors pursuant to an asset purchase agreement that closed in May 1997. After the sale, Ms. Bookspan was retained as an employee of the Debtors, specifically of the IT Group, Inc.

2. Prior to the PHR-sale, the Debtors had adopted, on January 1, 1996, an unfunded deferred compensation plan for officers and directors captioned "IT Corporation Deferred Compensation Plan" (the "Plan"). A copy of the Plan is attached to the accompanying declaration of Shelley Bookspan (the "Bookspan Dec.") at Exhibit "1."

3. The Debtors simultaneously adopted a master trust agreement captioned “IT Corporation Master Trust Agreement for Deferred Compensation Plans” (the “Master Trust Agreement”). A copy of the Master Trust Agreement is attached to the accompanying declaration of Thomas A. Johnson at Exhibit “1.” (Johnson Decl., Ex. “1”)

4. There were 11 participants when the Plan was first adopted in 1996, according to a letter from the Debtors' pension counsel. (See Johnson Dec., Ex. "2")

1       5.     A copy of a “Question and Answers” booklet describing the Plan and distributed by  
2 the Debtors is attached to the Bookspan Declaration at Exhibit “2.” (Bookspan Dec., Ex. “2”) The  
3 Plan allows for “participants” to defer a portion of their wages tax-free and to maintain the deferred  
4 amount in an account. (*Id.*; Questions and Answers at 1, 3)

5       6.     The Debtors claimed there were further advantages to the Plan. Amounts deferred  
6 were not included on the participant’s personal income tax returns in the year deferred (*Id.*); and  
7 were not subject to Federal Income Tax withholding (*Id.*). Amounts deferred were only includable  
8 in the personal income tax returns in the year such amounts were actually withdrawn from the  
9 participant’s Account. (*Id.*) Participants would earn deferred interest on the balance in the account.  
10 In 1997, the interest rate was Prime + 1%. (*Id.* at 3, 4)

12       7.     Ms. Bookspan enrolled in the Plan two months after the PHR closing—on July 30,  
13 1997, and re-enrolled in 1998 and 1999. (Bookspan Dec., Ex. “3” (3 enrollment forms))

15       8.     As part of each enrollment, Ms. Bookspan elected to defer virtually all of her base  
16 salary (90% in 1997 and 1998; 85% in 1999) and 50% of year-end bonuses for all years. (*Id.*)

17       9.     As of December 31, 2001, the Debtors owed Ms. Bookspan \$388,333.65 in back  
18 wages/bonuses, and \$40,775.03 in interest credited to her account, for a total of \$429,108.68. A  
19 Benefit Statement for Ms. Bookspan’s deferred-compensation account with the Debtors, is attached  
20 as Exhibit “4.” (Bookspan Dec., Ex. “4”)

22       10.    Ms. Bookspan made demand on the Debtors for payment of the balance in her  
23 Account on November 7, 2001. Mike Pepperney, a Vice President and officer, confirmed by e-mail  
24 that Ms. Bookspan was “scheduled for payment” for approximately 85% of the Account balance  
25 (the total amount less an early-withdrawal penalty) on January 2, 2002. (Bookspan Dec., Ex. “5”)

27       11.    The Plan states that the it is subject to ERISA and California law:  
28

1                   13.9    **Governing Law**. Subject to ERISA, the provisions of this  
2                   Plan shall be construed and interpreted according to the  
3                   laws of the State of California.

4                   (Booksman Dec., Ex. 1; Plan at 19)

5                   12.      The Master Trust Agreement states that it is subject to ERISA and California law:

6                   10.6     **Applicable Law**. Except to the extent, if any, preempted  
7                   by ERISA, this Master Trust Agreement shall be governed  
8                   by and construed in accordance with the laws of the State  
9                   of California. Any provision of this Master Trust  
                  Agreement prohibited by law shall be ineffective to the  
                  extent of any such prohibition, without invalidating the  
                  remaining provisions hereof.

10                  (Johnson Dec., Ex. 1; Master Trust Agreement at 18)

11                  13.      The Employee Retirement Income Security Program (29 U.S.C. § 1000 *et seq.*;  
12                  “ERISA”), states, with respect to benefit plans:

13                  "[T]he assets of a plan shall never inure to the benefit of any  
14                  employer and shall be held for the exclusive purposes of providing  
15                  benefits to participants in the plan and their beneficiaries . . ."

16                  29 U.S.C. § 1103(c)(1).

17                  14.      The Master Trust Agreement contains provisions purporting to make the assets of  
18                  the Trust subject to the claims of Debtors’s creditors:

19                  1.3      **Irrevocability; Creditor Claims**. . . . The Participants and their  
20                  Beneficiaries shall have no preferred claim on, or any  
21                  beneficial ownership interest in, any assets of the Trust. Any  
22                  rights created under the Plans and this Master Trust  
23                  Agreement shall be mere unsecured contractual rights of the  
24                  Participants and their Beneficiaries against the Company and  
25                  the Subsidiaries. Any assets held by the Trust will be subject  
26                  to the claims of the Company’s and the Subsidiaries’  
27                  general creditors under federal and state law in the event of  
28                  Insolvency (as defined below)."

29                  (Johnson Dec., Ex. 1, Master Trust Agreement at 1, ¶ 1.3).

1                   “3.7(b) At all Times during the continuance of this Trust, . . . , the  
2                   principal and income of the Trust **shall be subject to claims of**  
3                   **the general creditors of the Company and its Subsidiaries**  
4                   under federal and state law as set forth below . . . .”

5 (Johnson Dec., Ex. 1, Master Trust Agreement at 10, ¶ 3.7) (*Compare* terms of the Plan, Exhibit 1  
6 of the Bookspan Declaration, ¶ 13.1 at 18: “Any and all of an Employer’s assets shall be, and  
7 remain, the general, unpledged and unrestricted assets of the Employer. . . .”)

8                   15. There are elaborate provisions in the Master Trust Agreement as to when the Trustee  
9 of the Master Trust Agreement is permitted to cease making payments to Plan-participants in the  
10 event of insolvency. (Johnson Dec. Ex. “1”; Master Trust Agreement ¶¶ 3.7(a), (b) and (c) at 9-10)

11                   16. Post-petition, counsel for the Debtor informed that it appears the Debtors’  
12 bankruptcy cases may be “administratively insolvent.” (Johnson Dec. ¶ 5)

13                   17. When asked whether any trust *res* existed under the Trust, counsel for the Debtor  
14 stated that certain representatives from the Debtors informed her that the Plan and the Trust had  
15 never been funded; and that, even if there was funding, Ms. Bookspan’s only recourse was to file a  
16 claim because such assets would be subject to the claims of the bankruptcy estate (Johnson Dec.  
17 ¶ 6), apparently a reference to the terms of the Plan and Trust cited above in paragraph 13.

18                   18. Because counsel for the Debtor suggested that Ms. Bookspan may receive zero  
19 distribution on account of \$429,108.68 in back-wages representing nearly two years worth of  
20 unpaid work—Ms. Bookspan requested, and the Debtors’ counsel agreed, that the Debtors  
21 voluntarily provide Ms. Bookspan with documents and information under oath.

22                   19. Ms. Bookspan sought to verify that no assets relating to deferred-compensation  
23 obligations of the Plan had been placed in a trust, an escrow account, a bank account or functional  
24 equivalent, or that assets had not otherwise been designated as restricted. If assets have been placed  
25 in trust, accounts, or so designated, such assets arguably would be assets of the Trust, and excluded  
26 in trust, accounts, or so designated, such assets arguably would be assets of the Trust, and excluded  
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1 from the assets of the Debtor's bankruptcy estate. (Such exclusion would be pursuant to 11 U.S.C.  
2 § 541(d), and 29 U.S.C. § 1103(c)(1) (discussed below)).

3 20. Ms. Bookspan's Interrogatories and Request for Production of Documents are not  
4 attached as the requests themselves are reproduced in the Debtors' responses with the exception of  
5 Interrogatory No. 2, which was omitted entirely by the Debtors (making it difficult to determine to  
6 what question the Debtors were responding).

7 21. Some documentation provided by the Debtors suggests that the Debtors established a  
8 process for paying obligations arising under the Plan by making restrictive accounting entries. For  
9 example, some of the early documents cite as a feature of the proposed plan:

10 “Company funds account through ‘book reserve.’ ”  
11 (Johnson Dec. Ex. “3”) (emph. added)

12 22. However, the discovery provided by the Debtors was incomplete. One Interrogatory  
13 was misquoted and there was no response at all to another Interrogatory. In addition, the Debtors'  
14 responses to the requests were unusual in certain respects. All of the discovery responses were  
15 about two-weeks late, as detailed in the accompanying declaration of Thomas A. Johnson. Copies  
16 of both responses are attached. (Johnson Dec. Exhs. 4 and 5)

17 23. The Debtor's Response to Interrogatories state that:

18 “No assets have been transferred to or from the Trust and/or the Plan  
19 on account of obligations relating to deferred compensation.”

20 (Johnson Dec. Ex. 4; Response to Interrogatories at 7, Response No. 8). The Debtors did not define  
21 “Trust” or “Plan” in their Response to Interrogatories. Consequently, it appears the Debtors may  
22 not have addressed whether transfers of funds were made to a bank account, escrow account, some  
23 other account for deferred-asset obligations; or whether deferred-compensation assets have been  
24 restricted or unrestricted, or otherwise designated/set aside.

1           24. Ms. Bookspan is hopeful that the Debtors will address several issues raised by Ms.  
2 Bookspan's discovery requests at or before the Sale Hearing. The undersigned will be addressing  
3 written meet-and-confer questions to the Debtors' counsel regarding the following issues which,  
4 hopefully, will be resolved before the Sale Hearing:

5           a.       Whether contributions were made to accounts controlled by Compensation  
6 Resource Group, Inc., the administrator for the Plan, between November 1, 2001 and the Petition  
7 Date.

8           b.       Whether there was, or currently is, a balance in the following bank account,  
9 and whether a balance was transferred/returned to a DIP account, between November 1, 2001 and  
10 the Petition Date: Union Bank of California, # 06359-00

11           c.       whether funds-transfers were made to bank accounts or escrow accounts; and  
12 whether assets have been restricted or unrestricted or otherwise designated/set aside on the  
13 accounting records of the Trustee, Union Bank or the administrator (CRG) between November 1,  
14 2001 and the Petition Date, regardless of whether assets were physically transferred.

15           25. The Debtor's counsel has not yet responded to Ms. Bookspan's request for  
16 verification that no deferred-compensation assets have placed in debtor-in-possession ("DIP")  
17 operating accounts. (Johnson Dec. Ex. 6; Letter from T. Johnson to M. Cashman dated April 2,  
18 2002, ¶ 4) Because federal tracing rules may limit a beneficiary's right to trace funds that had been  
19 held in trust but are commingled in another account (*see e.g., In re Dameron*, 155 F.3d 718 (4th Cir.  
20 1998)), Ms. Bookspan sought to verify that no such transfers to DIP accounts had taken place.  
21 (Johnson Dec. ¶ 12) Hopefully these concerns will be addressed.

22           26. The Purchase and Sale Agreement with the Shaw Group states that the:  
23  
24           "Buyer shall purchase from Sellers, the Assets . . . including the  
25 following . . .:  
26           . . . . .  
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1 (n) all Cash (other than the Cash Consideration and the  
2 Employee Payments); . . .

3 (Purchase And Sale Agreement at 14)

4 27. Accordingly, if any cash account exists into which assets relating to deferred-  
5 compensation obligations have been deposited, such account would appear to be subject to transfer  
6 pursuant to the sale closing with the Shaw Group or, possibly, to a closing with the successful  
7 overbidder.

8

9 **ARGUMENT**

10 **The Court Should Protect Ms. Bookspan Because of: (A) the Possibility Assets Were  
11 Set Aside and the Problems in Producing Discovery; (B) Congress' Statutory Mandate That  
12 Deferred Compensation Benefits Be Preserved For the Exclusive Benefit of Plan  
13 Beneficiaries/ Employees, and (C) The Irrevocable Prejudice Accruing to Ms. Bookspan If  
Plan Assets Are Inadvertently Transferred to A Buyer.**

14 **1. Plan Assets May Have Been Set Aside.**

15 The Debtors, like most large companies, meets payroll obligations on a bi-weekly or bi-  
16 monthly basis. (Bookspan Dec. ¶ 15) It cannot be denied that there are firm time deadlines in  
17 preparing payroll for a company the size of the Debtors. It would not be surprising if the Debtors  
18 moved assets or cash to a special payroll or escrow account to make deferred-compensation  
19 payments that were coming due; or if the Debtors made accounting entries restricting cash in their  
20 accounts in anticipation of making certain payments that would arise in the ordinary course of the  
21 payroll cycle. Here, Ms. Bookspan's made demand for payment-in-full of her Account on  
22 November 7, 2001, and was promised that her payment of \$429,108.68 would be made January 2,  
23 2002.

24 It would not be surprising that payroll personnel were informed at the last minute to  
25 withhold checks for deferred-benefit beneficiaries on account of the pending bankruptcy. However,  
26 if funds had been previously segregated from, or designated to be separate from, the Debtors'  
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1 general assets, such assets would arguably be property of the Plan/Trust. Ms. Bookspan will be  
2 requesting that the Debtors respond to these concerns as part of the meet-and-confer process  
3 regarding discovery disputes.

4

5 **2. The Debtors Have Had Substantial Difficulties Responding to**  
6 **Discovery/Requests for Information.**

7 As noted above, the Debtors had substantial problems producing discovery. Responses  
8 were generally provided two weeks late, only days before the deadline for filing objections to the  
9 sale to the Shaw Group. One interrogatory was misquoted, and there appears to have been no  
10 response at all to another. The Debtors' responses themselves may be limited in scope. The  
11 Debtors state:

12  
13 "No assets have been transferred to or from the Trust and/or the Plan  
14 on account of obligations relating to deferred compensation."

15 (Johnson Dec. Ex. 4; Response to Interrogatories at 7, Response No. 8). But the Debtors did not  
16 define "Trust" or "Plan" in their Responses. Consequently, it appears the Debtors may not have  
17 addressed whether transfers of funds were made to bank accounts, escrow accounts, some other  
18 account for deferred-asset obligations; or whether deferred-compensation assets have been  
19 restricted or unrestricted, or otherwise designated/set aside.

20  
21 In addition, the Debtor's counsel has not yet responded to Ms. Bookspan's request for  
22 verification that no deferred-compensation assets have placed in debtor-in-possession ("DIP")  
23 operating accounts. (Johnson Dec. Ex. 6) As the Court is aware, federal tracing rules may limit a  
24 beneficiary's right to trace funds that had been held in trust but are commingled in another account  
25 (see e.g., *In re Dameron*, 155 F.3d 718 (4th Cir. 1998)). Ms. Bookspan sought to verify that no  
26 such transfers to DIP accounts had taken place.  
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1 As to the documents that were provided, one document suggests that the Debtors intended to  
2 make restrictive accounting entries when deferred-compensation obligations were scheduled for  
3 payment. (Johnson Dec. Ex. “3”) The Debtors’ other discovery responses raise the following  
4 questions.

- 5 1. whether contributions were made to accounts controlled by  
6 Compensation Resource Group, Inc., a servicing agent for the  
7 Plan.
- 8 2. whether there was, or currently is, a balance in the  
9 following bank accounts, and whether a balance was  
transferred/returned to a DIP account: Union Bank of California, #  
06359-00.
- 10 3. whether funds-transfers were made to bank accounts,  
11 escrow accounts—not just the “Trust and/or the Plan”;
- 12 4. whether assets have been restricted or unrestricted or  
13 otherwise designated/set aside on the accounting records of the  
14 Trustee, Union Bank or the administrator (CRG) between  
November 1, 2001 and the Petition Date, regardless of whether  
15 assets were physically transferred

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17 **3. Congress Intends That Deferred Compensation Assets Be Used For the  
18 Exclusive Benefit of the Beneficiaries.**

19 It is a fundamental rule that the bankruptcy estate only succeeds to the title and rights in the  
20 property that the debtor possessed. When a debtor is in possession of property impressed with an  
21 express or constructive trust whose validity is recognized, the estate will generally hold such  
22 property subject to the outstanding interests of the beneficiaries. 11 U.S.C. § 541(d).<sup>1</sup> Here, Ms.  
23 Bookspan holds a beneficial interest in Trust assets, if they exist, pursuant to the Master Trust  
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26 <sup>1</sup> *Gulf Petroleum, S.A. v. Collazo*, 316 F.2d 257 (1st Cir. 1983); *In re Shurtleff*, 778 F.2d 1416 (9th  
27 Cir. 1985); *In re N.S. Garrott & Sons*, 772 F.2d 462 (8th Cir. 1985); *Georgia Pacific Corp. v.  
Sigma Serv. Corp.*, 712 F.2d 962 (5th Cir. 1983); *In re Signal Hill-Liberia Ave. Ltd. Ptsp.*, 189 B.R.  
648 (Bankr. E.D. Va. 1995).

Agreement and the Plan. However, the terms of the Plan and Master Trust Agreement are themselves limited by applicable federal law.

In 1975, the Congress passed the Employee Retirement Income Security Program (“ERISA”). As part of ERISA, Congress specifically prohibited employers from ever using assets in a deferred compensation plan for anything but the exclusive benefit of plan participants:

"[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the **exclusive** purposes of providing benefits to participants in the plan and their beneficiaries . . . "

29 U.S.C. § 1103(c)(1).

The Third Circuit has affirmed a federal district court decision strictly enforcing the statutory scheme of Title 29. In *Crown Cork and Seal Company, Inc. v. Teamsters Pension Fund*, 549 F. Supp. 307 (Dist. Pa. 1982), *aff'd* 720 F.2d 661 (1983), the District Court noted that ERISA was enacted to provide for comprehensive regulation of employee pension plans; and that Congress' overriding concern was that employees with long years of employment and contributions are assured of receiving their pension benefits (*Id.* at 308-309, citing § 1103(c)(1) and *Reuther v. Trustees of the Trucking Employees of Passaic and Bergen County Welfare Fund*, 575 F.2d 1074, 1077 (3d Cir. 1978)). The District Court held that an employer does *not* possess a statutory right to bring a cause of action under 29 U.S.C. § 1132(e) to recover mistaken contributions to a pension fund because "employers" are not a class of individuals empowered to bring a civil action under ERISA. (*Id.* at 310-312) If an employer cannot recover mistaken contributions by right under § 1132(e), then surely actual contributions previously made by an employer cannot be returned to an employer under § 1103(c)(1).

1           Given the plain meaning of 29 U.S.C. § 1103(c)(1) and the holding of *Crown Cork*, it is  
2 highly unlikely that the District Court<sup>2</sup> would ever give effect or hold valid the provisions of the  
3 Plan cited above in paragraph 14, purporting to make the assets of the Trust subject to the claims  
4 of the Debtor's general unsecured creditors.

5

6

7           **4. Transferring A Deferred-Compensation Cash Account At Closing to Shaw**  
8           **Group Or To The Successful Overbidder May Irrevocably Prejudice Ms. Bookspan's Right to**  
9           **Trace Funds Because of Equitable Mootness Concerns.**

10           Ms. Bookspan is concerned that cash accounts relating to the Plan are not transferred to the  
11 Shaw Group or a successful overbidder. As the Court knows, debtors and buyers may take  
12 unilateral actions post-closing that may make otherwise valid legal claims equitably moot. *See,*  
13 *e.g., In re Highway Truck Drivers & Helpers Local Union 107*, 888 F.2d 293, 297 (3d Cir. 1989)  
14 (holding in case where § 363(m) protections were sought: "generally, an appeal will be dismissed as  
15 moot when events occur during the pendency of the appeal which prevent the appellate court from  
16 granting any effective relief.") Accordingly, Ms. Bookspan requests that the following language be  
17 inserted in any order approving the sale, to either the Shaw Group or the Successful Overbidder:

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19           **a. Proposed Language to Insert in Order Approving Sale:**

20           The Debtors shall be, and hereby are, prohibited from transferring to  
21           the Shaw Group [or the successful overbidder], each and every cash  
22           account, escrow account, payroll account or functionally equivalent  
23           account that may be related to obligations arising under the  
24           Deferred Compensation Plan Effective January 1, 1996 (the

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26

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27           <sup>2</sup> The District Court has exclusive jurisdiction over causes of action arising under ERISA. 29  
28           U.S.C. § 1132(e)(1).

“Plan”); and from transferring each and every cash account, escrow account, payroll account or functionally equivalent account with respect to which the Debtors’ made accounting/book entries restricting the use of cash or cash equivalent in such account due to obligations arising under the Plan from the period November 1, 2001 to the Petition Date, absent further order of this Court in a contested matter or adversary proceeding.

If the Debtor is correct that no such accounts exist or that no restrictions on an account were made, then such a provision will have no impact on the closing of the Debtors' sale to the Shaw Group or to a successful overbidder.

## **RELIEF REQUESTED**

**WHEREFORE**, for the foregoing reasons, Ms. Bookspan respectfully requests that the following language be inserted in any order approving the sale, to either the Shaw Group or the Successful Overbidder:

The Debtors shall be, and hereby are, prohibited from transferring to the Shaw Group [or the successful overbidder], each and every cash account, escrow account, payroll account or functionally equivalent account that may be related to obligations arising under the Deferred Compensation Plan Effective January 1, 1996 (the "Plan"); and from transferring each and every cash account, escrow account, payroll account or functionally equivalent account with respect to which the Debtors' made accounting/book entries restricting the use of cash or cash equivalent in such account due to

1 obligations arising under the Plan from the period November 1,  
2 2001 to the Petition Date, absent further order of this Court in a  
3 contested matter or adversary proceeding.

4 In the alternative, Ms. Bookspan requests that the Court deny the Sale Motion to the extent  
5 the Motion seeks to transfer any cash or accounts to the Shaw Group, or the Successful Overbidder.

6 Dated: April 11, 2002

7 LAW OFFICES OF THOMAS A. JOHNSON

8 /s/ Thomas A. Johnson

9 By: \_\_\_\_\_  
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15 Attorney for Shelley Bookspan

16 \_\_\_\_\_  
17 <sup>3</sup> A motion to appear *pro hac vice* pursuant to Local Rule 9010-1(c) will be filed with the Court  
18 before the Sale Hearing.  
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